IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1971

No. 71-5103

JOHN J. MORRISSEY and
G. DONALD BOOHER,

Petitioners,

v.

LOU V. BREWER, WARDEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF

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Washington D.C. THIEL PRESS 202 393 0625

SUBJECT INDEX

TABLE OF CASES AND OTHER CITATIONS

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OPINIONS OF THE COURTS BELOW

The Orders of the United States District Court for the Southern District of Iowa denying the Petitioners' respective Petitions for Writ of Habeas Corpus have not been reported. They are, however, reproduced in the Single Appendix filed herein at pages 70-71 and 113-14 thereof.

The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the above referred to Orders of the District Court, is reported at 443 F.2d 942 (8th Cir. 1971).

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

The Judgments of the United States Court of Appeals for the Eighth Circuit were entered on April 21, 1971. Said Judgments by the Court of Appeals affirmed the prior Orders of the United States District Court for the Southern District of Iowa denying the Petitioners' respective Petitions for Writ of Habeas Corpus. A Petition for Rehearing filed by the Petitioner Booher was denied by the Court of Appeals on June 7, 1971. The Petitioners' respective Motions for Leave to Proceed in Forma Pauperis and joint Petition for Writ of Certiorari were filed in this Court on July 19, 1971, within 90 days of the entry of the Judgments of the Court of Appeals and within 90 days of the Order of the Court of Appeals denying Petitioner Booher's Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 2101 (c). On December 20, 1971, this Court granted the Petitioners' Motions for Leave to Proceed in Forma Pauperis and granted the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law;
>
> . . .

Sections 247.5, 247.9, 247.12, Code of Iowa (1971):

247.5 Power to parole after commitment—detainers. The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole . . .

247.9 Legal custody of paroled prisoners. All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.

247.12 Parole time not counted. The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be revoked.

QUESTION PRESENTED FOR REVIEW

The question presented for review in these cases is whether the rights guaranteed to these Petitioners by the due process clause of the Fourteenth Amendment to the Constitution of the United States were violated by the State of Iowa by the action of the Iowa Board of Parole in revoking the Petitioners' respective paroles without providing either of said Petitioners a prior evidentiary hearing to establish the fact of parole violation, at which Petitioners could confront and cross-examine the witnesses upon whose testimony their respective paroles were revoked and at which Petitioners could present evidence on their own behalf.

STATEMENT OF THE CASE

The case herein concerns two separate Petitions for Writ of Habeas Cropus which were denied by the United States District Court for the Southern District of Iowa on April 15, 1970 and June 10, 1971, respectively. Jurisdiction in the District Court was, in both cases, based upon 28 U.S.C. § 2254. The Orders denying the respective Petitions for Writ of Habeas Corpus were both appealed to the United States Court of Appeals for the Eighth Circuit, consolidated by that Court, heard by that Court *en banc*, and affirmed. A brief, factual and procedural history of each of the cases is set forth in the following paragraphs.

PETITION OF JOHN J. MORRISSEY:

On January 5, 1967, Petitioner John J. Morrissey, herein referred to as "Morrissey," entered a plea of guilty to a County Attorney's Information charging him with false uttering of a check and was, on the same date, sentenced by the Linn County District Court in Cedar Rapids, Iowa, to confinement in the Iowa State Penitentiary for a term not exceeding seven (7) years (A. 42-43). Subsequently, on June 20, 1968, Morrissey was granted a parole by the Iowa Board of Parole and released from the Iowa State Penitentiary (A. 30). On or about January 24, 1969, he was arrested in Cedar Rapids, Iowa, for parole violation, confined in the Linn County Jail in Cedar Rapids, Iowa (A. 65-69), and subsequently, on January 31, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and ordering that he be returned to the Iowa State Penitentiary (A. 30).

Morrissey was not, at any time during any of the proceedings with respect to the parole revocation which caused him to be returned to the Iowa State Penitentiary, granted a hearing or other opportunity to question, challenge or even become aware of the facts which formed the basis of his alleged parole violation, nor was he granted any

opportunity of confronting or cross-examining those upon whose testimony his parole was revoked, or to present evidence on his own behalf.

On June 25, 1969, Morrissey petitioned the District Court of the State of Iowa in and for Lee County for Writ of Habeas Corpus, alleging that his parole had been revoked without a hearing and without appointment of counsel. Said Petition was denied by said Court on the following day (A. 54-58). Thereafter, on July 8, 1969 Morrissey filed a Petition for Writ of Habeas Corpus in the Supreme Court of Iowa. This Petition was dismissed on July 25, 1969 on the grounds that said Petition was not made to the Court or Judge most convenient to the Petitioner, as required by Iowa law; that the legality of his imprisonment had been adjudged by a previous ruling on his Petition for Writ of Habeas Corpus to the Lee County District Court; and that if he was entitled to any relief, his remedy would be to appeal the denial of his Petition by the Lee County District Court (A. 36).

On August 11, 1969, Morrissey filed a Notice of Appeal to the Iowa Supreme Court from the denial of his Petition for Writ of Habeas Corpus by the Lee County District Court (A. 60). This appeal was summarily dismissed on September 15, 1969, on the grounds that the Notice of Appeal was not timely filed (A. 37).

Having exhausted his state remedies, Morrissey then filed, on September 12, 1969, his Petition for Writ of Habeas Corpus to the United States District Court for the Southern District of Iowa (A. 3-7). This Petition was denied on April 15, 1970 (A. 70-71). Notice of Appeal from said denial was filed on April 21, 1970, considered by the District Court to be an Application for Certificate of Probable Cause pursuant to 28 U.S.C. § 2253, and denied on April 21, 1970 (A. 72-73, 74).

On June 3, 1970, the United States Court of Appeals for the Eighth Circuit granted Petitioner's Application for Certificate of Probable Cause and appointed counsel to

represent Petitioner on his appeal (A. 75). The denial of this Petitioner's Petition by the District Court was affirmed by 4-3 Opinion of the Court of Appeals *en banc*, the Opinion and Judgment affirming the Order of the District Court being filed on April 21, 1971 (A. 119-54, 155).

PETITION OF G. DONALD BOQHER:

On April 29, 1966, Petitioner G. Donald Booher, herein referred to as "Booher," entered a plea of guilty to a County Attorney's Information charging him with forgery and was, on the same date; sentenced by the O'Brien County District Court, Primghar, Iowa, to confinement in the Iowa State Penitentiary for a term not exceeding ten (10) years (A. 81). Subsequently, on November 14, 1968, Booher was granted a parole and was released from the Iowa State Penitentiary (A. 110). On or about August 28, 1969, he was arrested for parole violation and confined to the O'Brien County Jail in Primghar, Iowa (A. 109). On or about September 13, 1969, an Order was entered by the Iowa Board of Parole revoking his parole and ordering that he be returned to the Iowa State Penitentiary (A. 110).

As in the case of Petitioner Morrissey, Booher was not, at any time during any of the proceedings with respect to the parole revocation which caused him to be returned to the Iowa State Penitentiary, granted a hearing or other opportunity to question, challenge, or become aware of the facts which formed the basis of his alleged parole violation, nor was he granted the opportunity of presenting evidence on his own behalf nor of confronting or of cross-examining those upon whose testimony his parole was revoked.

On November 21, 1969, Booher filed, in the District Court of the State of Iowa in and for Lee County, a Petition for Writ of Habeas Corpus, alleging that his constitutional rights had been denied in that his parole had been revoked without a hearing. This Petition for Writ of Habeas Corpus was denied on November 26, 1969 (A. 96). A subsequent Petition for Writ of Habeas Corpus was filed with

the Lee County District Court on December 22, 1969, and was denied on January 6, 1970, on the grounds that it presented no grounds for relief that did not exist at the time of the filing of the first Petition for Writ of Habeas Corpus (A. 97). On February 26, 1970, a third Petition for Writ of Habeas Corpus filed in the Lee County, Iowa, District Court was likewise denied because the grounds set out therein existed at the time of his original Petition and should have been presented at that time (A. 98).

On March 11, 1970, the Petitioner filed in the United States District Court for the Southern District of Iowa a Petition for Writ of Habeas Corpus (A. 78-85), which Petition was denied on June 10, 1970 (A. 113-14). On June 16, 1970, Booher filed in the United States District Court for the Southern District of Iowa an Application for Certificate of Probable Cause (A. 115), which was denied by said Court on June 16, 1970 (A. 116-17).

On July 23, 1970, the United States Court of Appeals for the Eighth Circuit granted Booher's Application for Certificate of Probable Cause, ordered that said appeal be docketed and consolidated with Cause No. 20328 (*Morrissey v. Brewer*), appointed counsel to represent Booher and ordered that appointed counsel prepare a joint brief in Causes Nos. 20328 and 20425 (A. 118).

The denial of this Petitioner's Petition for Writ of Habeas Corpus by the District Court was affirmed by 4-3 Opinion of the Court of Appeals *en banc*, the Opinion and Judgment affirming the Order of the District Court being filed on April 21, 1971 (A. 119-54, 156). A subsequent Petition for Rehearing filed by the Petitioner Booher *pro se* was denied on June 7, 1971 (A. 161).

SUMMARY OF ARGUMENT

The paroles of the Petitioners herein were granted and revoked by the Iowa Board of Parole pursuant to Iowa statutory law which does not require a hearing prior to

revocation of parole. Notwithstanding that this Court has stated in *Escoe v. Zerbst* that probation is an act of grace, more recent decisions of this Court, including *Goldberg v. Kelly*, established that once a "privilege" is granted by a state that said privilege may not be terminated or revoked without a hearing if the interest of the individual in maintaining his privileged status outweighs the state's interest in summary adjudication. A weighing of the interests involved in the parole revocation situation reveals that the parolee's interest in continued conditional liberty outweighs the state's interest in summary adjudication and that a hearing is, therefore, required prior to revocation of parole.

In addition, this Court's holding in *Mempa v. Rhay*, stating that a probationer has right to counsel at a revocation of probation hearing, impliedly requires that a hearing be held prior to revocation of parole. Further, the "contract theory" and "constructive custody" theories, which have been relied upon by various courts to justify the view that a hearing is not required prior to revocation of parole or probation, are not logically sound in theory of fact and do not provide a sufficient legal basis for holding that such a hearing is not required.

Finally, due process requires that a hearing be held prior to revocation of parole and that the parolee receive adequate notice of such hearing, that the parolee be given an opportunity to appear at such hearing, an opportunity to confront and cross-examine adverse witnesses, and an opportunity to present evidence in his own behalf.

ARGUMENT

Sections 247.5 and 247.9, Code of Iowa (1971), provide in part as follows:

> *247.5. Power to parole after commitment—detainers.* The board of parole shall determine which of the inmates of the state penal institutions qualify and thereafter shall be placed upon parole. Once an

> inmate is placed on parole he shall be under the supervision of the director of the division of corrections of the department of social services. There shall be a sufficient number of parole agents to insure proper supervision of all persons placed on parole. Parole agents shall not revoke the parole of any person but may recommend that the board of parole revoke such parole. . . .
>
> *247.9. Legal custody of paroled prisoners.* All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of the chief parole officer, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.

The paroles of both Morrissey and Booher, the Petitioners herein, were granted and revoked by the Iowa Board of Parole pursuant to the authority of the statutory sections quoted above. Petitioners believe that such revocations of their paroles resulted in an unconstitutional denial of due process guaranteed to the Petitioners by the Fourteenth Amendment, when such revocations were accomplished without a prior hearing at which Petitioners were afforded the opportunity to confront and cross-examine the witnesses upon whose testimony the revocations were based, and without the opportunity to present evidence on their own behalf.

The statutory language quoted above does not require any notice or hearing to the parolee upon revocation of his parole. The Iowa Supreme Court, the United States District Court for the Southern District of Iowa and the United States Court of Appeals for the Eighth Circuit have each held that the due process clause of the Fourteenth Amendment does not require any notice or hearing upon revocation of parole by the Iowa Board of Parole. *Morrissey v. Brewer*, 443 F.2d 442 (8th Cir. 1971) (A. 119-54); *Curtis v. Bennett*, 351 F.2d 931 (8th Cir. 1965); *Gardels v. Brewer*, 190 N.W.2d 803 (Iowa 1971); *Curtis v. Bennett*, 131 N.W.2d

1 (Iowa 1964); see also the unreported Orders of the District Court below (A. 70-71, 113-14). Petitioners submit, however, that these decisions are inconsistent with and contrary to the logic and holdings in the recent decisions of this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mempa v. Rhay*, 389 U.S. 128 (1967).

While this Court has never ruled on the precise question presented by these cases, other Federal Courts have held that the due process clause does require a hearing and an opportunity to be heard prior to revocation of parole, *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971); *Murray v. Page*, 429 F.2d 1359 (10th Cir. 1970); *Goolsby v. Gagnon*, 322 F. Supp. 460 (E.D. Wis. 1971), or that due process requires a hearing and an opportunity to be heard prior to revocation of *probation*, *Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970). In addition, highly persuasive dissents supporting the Petitioners' position herein have been written in connection with cases in which the majority opinion holds that due process does not require such a hearing. See Lay, J., dissenting in *Morrissey v. Brewer*, 443 F.2d 942, 952-65 (A. 134-54), and Celebreeze, J., dissenting in *Rose v. Haskins*, 388 F.2d 91, 97-105 (6th Cir. 1968). Petitioners submit that the logic and reasoning in *Bearden v. South Carolina*, *Murray v. Page* and *Hahn v. Burke* and in the dissents of Judges Lay and Celebreeze in *Morrisey v. Brewer* and *Rose v. Haskins* are more accurate, sound and persuasive than that in the majority opinions in *Morrissey v. Brewer* and *Rose v. Haskins*, and more consistent with the holdings of this Court in *Goldberg v. Kelly* and *Mempa v. Rhay*. Petitioners believe, therefore, that this Court should hold that the due process clause of the Fourteenth Amendment required a hearing and an opportunity to be heard prior to the revocation of the paroles of the Petitioners herein.

I. DUE PROCESS APPLIES TO REVOCATION OF PAROLE HEARINGS, NOTWITHSTANDING THE FACT THAT PAROLE MAY BE CONSIDERED A "PRIVILEGE" AND NOT A "RIGHT".

Nearly all of the cases which have held that due process does not require a hearing prior to revocation of probation or parole have relied, at least in part, upon the decision of this Court thirty-seven years ago in *Escoe v. Zerbst*, 295 U.S. 490, (1935). In that case, the Petitioner had been arrested for violation of his federal probation and returned directly to prison without a hearing. This Court held that the failure to take the Petitioner before the Court, as required by statute, rendered the revocation procedure defective. Although the decision in *Escoe v. Zerbst* was clearly based on a failure to comply with the applicable statute, Justice Cordozo writing for the Court continued by stating:

> In thus holding we do not accept the Petitioner's contention that the privilege has a basis in the Constitution apart from any statute. Probation or the suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. 295 U.S. at 492-93.

Subsequent to this dictum by Justice Cordozo various state and lower federal courts have held that since probation and parole are matters of grace, i.e. "privileges" and not "rights," notice and hearing are not constitutionally required in connection with the revocation of such "privileges." However, as pointed out by the Seventh Circuit in *Hahn v. Burke, supra*, and the Second Circuit in *Bey v. Connecticut*, 443 F.2d 1079 (2nd Cir. 1971), it is no longer tenable, particularly in view of more recent statements of this Court in *Goldberg v. Kelly, supra; Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 423 (1951), *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), *Greene v. McElroy*, 360 U.S. 474 (1959), and *Hannah v. Larche*, 363 U.S. 420 (1960), to rely unanalytically on the

dictum in *Escoe v. Zerbst* as authority for the proposition that since probation or parole are in the first instance privileges, and not rights, that they may be coupled with such conditions in respect to their duration as the legislature may prescribe, including the revocation thereof without notice or hearing.

In holding in *Hahn v. Burke* that "fundamental constitutional requirements of due process necessitate a limited hearing prior to a probation revocation" the Seventh Circuit stated that:

> While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court, *see Escoe v. Zerbst*, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566 (1935), essential procedural due process no longer turns on the distinction between a privilege and a right. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (May 23, 1970); *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963); *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956). *See also, Von Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1967-8). 430 F.2d at 103.

This Court held in *Goldberg v. Kelly* that the termination by a state of public assistance payments to a particular recipient without a *prior* evidentiary hearing denies the recipient procedural due process in violation of the due process clause of the Fourteenth Amendment. In arriving at its decision in *Goldberg v. Kelly*, this Court stated:

> Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 22 L. Ed. 2d 600, 611, 89 S. Ct. 1322 (1969). Relevant constitutional restraints apply as much to

> the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963); or to denial of a tax exemption, *Speiser v. Randall*, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958); or to discharge from public employment, *Slochower v. Board of Higher Education*, 350 U.S. 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956). The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 852, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236, 81 S. Ct. 1743 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." See also *Hannah v. Larche*, 363 U.S. 420, 440, 442, 4 L. Ed. 2d 1307, 1320, 1321, 80 S. Ct. 1502 (1960). 397 U.S. at 262-63.

Thus, it appears, even though a prisoner has no "right" to parole, that once a parole is granted, the question as to whether a state may act to revoke such parole or to terminate the status enjoyed by a parolee must be decided only after determining the "precise nature of the government function involved as well as the private interest" that may be affected by government action, and a weighing of the private interest in avoiding the consequences of such state action against the state interest in summary adjudication without notice or hearing.

II. A PAROLEE'S INTEREST IN REMAINING AT LIBERTY GREATLY OUTWEIGHS THE STATE'S INTEREST IN SUMMARY ADJUDICATION

Turning to an analysis of the nature of the private interest of the parolee and the governmental interest in summary adjudication, it cannot be persuasively argued that a parolee does not have a substantial interest in the continued opportunity to remain at liberty in society as opposed to being returned to prison and further confined therein, even though his liberty on parole is conditional and may be restricted in terms of his mobility and conduct. A parolee is free to enjoy a wholesome and full family and community life and is in fact, as a part of the rehabilitory goal of current correctional philosophy, encouraged to do so. On the other hand, a prisoner is confined to a generally unwholesome atmosphere and severely restricted in his every act and is, while incarcerated, unable to contribute to society as a whole. In addition, the revocation of a parolee's conditional liberty will undoubtedly interrupt, if not destroy, the home life, employment and reputation of the parolee, thereby eroding what efforts the parolee has made while on parole to once again become a reputable, useful and productive member of society. See *Bey v. Connecticut, supra* at 1086-87. The parole revocation may well also delay, if not terminate, the possible restoration to said parolee of many civil rights enjoyed by other citizens. Finally, if the procedures relating to the revocation are not fair, or do not appear to the parolee to be fair, the revocation of his parole will no doubt embitter the parolee against the society which has unfairly returned him to confinement further impeding his eventual return to society as a useful and productive member thereof.

Against these obvious and substantial interests of the parolee in continued conditional liberty while on parole must be weighed the governmental interests in summary adjudication, that is, parole revocation without a hearing of any kind. A reading of the dissenting opinions in *Morrissey*

v. Brewer and *Rose v. Haskins*, as well as a review of *Sklar, Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. Law 175, 194-96 (1966), reveals that those opposed to a hearing prior to parole revocation have urged that the governmental interest in summary parole revocation without notice or hearing is supported by the following adverse results that will allegedly follow the requirement of a hearing prior to revocation:

1) The full panoply of criminal rights will unduly overburden the administrative hearing process, bogging the parole board down in needless procedure;

2) Parole boards, knowing of the increased burden of revocation hearings, would become unduly conservative in granting paroles, thereby deterring the goal of rehabilitation served by the granting of paroles whenever possible;

3) The requirement of hearings would interfere with the *parens patriae* relationship between boards of parole and parolees, thereby deterring the rehabilitative ideal of parole;

4) There would be an increased burden on parole officers due to the requirement that they appear and testify, thereby reducing their effectiveness in supervisory duties;

5) Informants and others with information regarding parole violations would be reluctant to come forward for fear of being discovered or for fear of being cross-examined, thereby reducing the effectiveness of such informants;

6) There would be increased costs to government;

7) Any hearing would interfere with the exercise of the correctional expertise and discretion of parole boards.

Upon examination, it appears that the substance of these "governmental interests" is that the result of a required hearing will be to either (1) cause the boards of parole or

parole officers to become less efficient or less likely to perform their functions or (2) inhibit or deter rehabilitation. Petitioners submit that upon analysis these feared results are not supported by either logic or experience.

With respect to the argument that hearings will overburden the board of parole, it is necessary to examine the purpose of such a hearing. Since parole is a conditional liberty and a parolee is either expressly or impliedly assured upon the granting of his parole that he will be permitted to remain at liberty so long as he does not violate the conditions of his parole. The most basic and fundamental concept of fairness dictates that a parolee should be entitled to rely on the promise that he can remain at liberty so long as he does not violate any of the conditions of his parole. It follows that the initial determination prior to revocation is that the parolee has *in fact* violated the conditions of his parole. After a violation is established, the board must then call upon its expertise, knowledge and discretion to determine the proper action to take with respect to revocation. In those cases where a violation of parole conditions is established by either a voluntary admission by the parolee or by conviction of the parolee of a separate criminal offense, a lengthy or involved fact-finding hearing would not seem to be necessary. Therefore, a hearing would seem to impose an increased burden upon the board only in those cases in which the parolee denied the violation of the conditions of his parole. In this respect, the thirty-five year experience in the State of Michigan, where parolees are entitled by statute to a hearing (even though this hearing is not required until after his return to the correctional institution) indicates that "[t]ypically, five or six such hearings are held each year. The largest number of hearings held in a single year has been ten." *Dawson, Sentencing, The Decision as to Type, Length, and Conditions of Sentence, Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States*, p. 355 (1969). Thus, if the experience in Michigan is typical, the overall burden upon the boards of

parole in terms of the number of such hearings and the increased cost incident thereto, is not substantial. In any event, it does not seem that any burden imposed upon the board of parole by a requirement that some type of prior hearing be held to establish the fact of parole violation, or the increased cost incident to such a hearing, could justify the denial to a parolee of a hearing to which he would otherwise be entitled.

Further, in respect to the burden of such a hearing, it is not urged that the full panoply of rights applicable in the case of a criminal trial be applied to a parole revocation hearing. Petitioners urge only that a fact-finding hearing be held to determine the *fact* of parole violation. If due process requires a hearing to establish violation of parole, the extent of the hearing need only be that which is appropriate and necessary under the circumstances. Such a hearing relating to the fact of parole violation need not interfere with the subsequent decision of the board of parole regarding the appropriate disposition to be made once the violation is established. After a violation is clearly established there would appear to be no injustice in taking the matter of disposition under advisement with the board of parole then being free to consider the proper disposition without interruption or interference. Also, in cases in which the fact of violation was sufficiently established, by voluntary admission of violation or by conviction of a separate offense, so as to reduce the necessity for or extent of a fact-finding hearing, there would certainly be little or no interference with the decision regarding disposition.

The argument that a hearing would deter the rehabilitory process by causing boards of parole to grant fewer paroles "casts unwarranted aspersions on the dedication of parole boards . . . [and] assumes that parole board members would react vindictively to spite the legal process . . . [and] it assumes that parole boards would deny paroles to otherwise deserving prisoners and thereby delay their optimum rehabilitation merely to save themselves a little time." *Morrissey*

v. Brewer, supra at 959 (A. 145) (Lay, dissenting). In addition, the weight of this argument is severely lessened if the number of such hearings is small, as indicated by the Michigan experience, and, finally, there is evidence that the requirement of a hearing does not in fact produce this undesirable result. *Sklar, supra* at 194 N. 157. The weight of the related argument that required hearings will interfere with the *parens patriae* relationship between the parolee and the board of parole has been considerably diminished by this Court's decision in *In Re Gault*, 387 U.S. 1 (1967). Even though there may be such a relationship or something similar thereto, it is obvious, in the situation in which the parolee denies that he has committed the alleged acts which would constitute a violation of his parole, that no "identity of interests" exists between the parolee, and the board of parole so long as the fact of violation remains unestablished. It is at this precise point – when the fact of violation has not been established – that a hearing is most critical to the parolee, and, therefore, the *parens patriae* argument seems particularly inappropriate in this situation.

The argument that hearings would require the time of parole officers in testifying at such hearings is also diminished by the evidence indicating the number of hearings would not be great. In addition, the effect of knowledge on the part of a parole officer that the evidence regarding violation will be scrutinized, rather than taken at full face value, will probably have the desirable result, that officers will be more careful, if not more conscientious, in gathering and presenting evidence of violation to the board of parole. Likewise, the argument that informants would be less likely to come forward, knowing that they may be required to appear at a hearing is clearly outweighed by the danger that the information received from an informant not subject to cross-examination may be misguided, faulty, biased or flatly false, and yet, if not contradicted or satisfactorily explained by the evidence or testimony of the parolee, form the basis for revocation. If the information supplied by the informant can be verified by other sources, the informant need

not necessarily be required to appear at a hearing anyway.

After considering the nature of the parolee's interest in continued liberty and the nature of the governmental interest in summary adjudication, Petitioners submit that the interest of the parolee greatly outweighs the burden which would in fact be placed upon the state and that, under the test enunciated by this Court in *Goldberg v. Kelly* and the cases cited therein, the due process clause of the Fourteenth Amendment requires an evidentiary hearing of some type prior to revocation of parole to allow Petitioners to be confronted with his parole violation and to be heard. Indeed, since the purpose of such a hearing as contemplated by Petitioners would be to insure that a parolee's conditional liberty not be revoked in the absence of sufficient evidence that the conditions of parole had in fact been violated, any concept of essential fairness would seem to require such a hearing to insure against revocation based upon half-truths, faulty, biased or false information or facts which the parolee may be able to satisfactorily explain if given the opportunity.

III. REVOCATION OF PAROLE IS A "CRITICAL STAGE" IN CRIMINAL PROCEEDINGS AND THE REQUIREMENTS OF DUE PROCESS ARE APPLICABLE THERETO

In addition to the position of Petitioners that a balancing of the interests of the parolee and state in the parole revocation context forces the conclusion that procedural due process requires a hearing prior to revocation of parole, Petitioners believe an analysis of this Court's holding in *Mempa v. Rhay* further requires a hearing prior to revocation of parole.

Mempa was convicted on his plea of guilty of the offense of "joy riding" and was placed on probation for two years on the condition that he first spend thirty days in the county jail, and the imposition of sentence was deferred. Subsequently, his probation was revoked pursuant to the

Washington law and at a hearing he was then sentenced to confinement in the penitentiary. At the hearing at which time his probation was revoked and sentence imposed, Mempa was not provided with counsel. In argument before this Court, there was some dispute between Mempa and the state as to whether the hearing at which his probation was revoked and sentence imposed was, in fact, a hearing upon revocation of probation or merely a sentencing and, therefore, a part of the original criminal proceedings. In holding "that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," this Court stated:

> All we decide here is that a lawyer must be afforded at this proceeding, *whether it be labeled a revocation of probation or a deferred sentencing.* [Emphasis added.] 389 U.S. at 137.

Thus, this Court held that regardless of whether the hearing was a revocation of probation hearing or a deferred sentencing, the constitutional rights of Mempa applied to said hearing.

Subsequent to the decision in *Mempa*, there has been considerable disagreement of opinion among the various courts as to the effect of this Court's opinion. Some courts, including the District Court in these cases, have stated that the holding in *Mempa* is limited to hearings regarding the imposition of sentence and thus, is merely an extension of the right to counsel at a critical stage of the criminal proceedings. *Bearden v. South Carolina, supra; Williams v. Patterson*, 389 F.2d 374 (10th Cir. 1968); *Rose v. Haskins, supra; Morrissey v. Brewer*, unreported opinion of the District Court below (A. 71); *Booher v. Lee and O'Brien Counties, et al.*, unreported opinion of the District Court below (A. 113-14).

On the other hand, some courts have held that the effect of this Court's decision in *Mempa* is that counsel is required at all proceedings where substantial rights of the criminal accused may be affected, including hearings relating to revo-

cation of probation or parole where sentence has previously been imposed. *Ashworth v. United States*, 391 F.2d 245 (6th Cir. 1968); *Hewett v. North Carolina*, 415 F.2d 1316 (4th Cir. 1969). See also, *Bearden v. South Carolina, supra* at 1096-98 (dissenting opinion). The Court in *Hewett v. North Carolina* stated in this respect that:

> The principle which undergirds that decision [*Mempa*] is broad indeed, "appointment of counsel for an indigent is required at *every stage* of a criminal proceeding where *substantial rights* of a criminal accused may be affected." [Emphasis supplied.] 389 U.S. at 257. While the right to counsel applies to "criminal proceedings," we have little doubt that the revocation of probation is a stage of criminal proceedings. Even if a new sentence is not imposed, it is the event which makes operative the loss of liberty. 415 F.2d at 1322.

In this same regard, Justice Rawlings of the Iowa Supreme Court, dissenting in *Cole v. Holliday*, 171 N.W.2d 603 (Iowa 1969), stated:

> A fair analysis of the words "criminal proceeding" and "substantial rights" to me affords no reasonable or plausible basis upon which to conclude the holding in *Mempa* is limited to actual trial. Even though probation be characterized as "a matter of grace" it still remains, when it is revoked the probationer's substantial rights are materially affected. 171 N.W.2d at 611 (dissenting opinion).

Petitioners submit that revocation of parole is indeed a stage of a criminal proceeding in which substantial rights are materially affected, and that, therefore, the constitutional requirements of due process apply to the manner in which the decision respecting revocation of parole is determined, just as said requirements apply at other stages of criminal proceedings. If a probationer has a right, arising from the Federal Constitution, to have counsel appointed to represent him at a probation revocation hearing, as all but the narrowest reading of *Mempa* would require, Peti-

tioners submit that the Federal Constitution certainly requires that the procedural requirements of due process also apply to revocation of probation and parole. Speaking to this point one authority has stated:

> Curiously, *Mempa* makes no specific mention of the right to a hearing in a probation revocation proceeding. In order to decide if the states were required to appoint counsel, the Court first had to characterize probation revocation as a critical stage in the criminal process. The marriage of right-to-counsel and "critical stage" is largely based on the assumption that counsel has a meaningful function to perform. Presumably, that function is something more than chatting with the judge or the probationer after a revocation decision has been made. Unless counsel is afforded an opportunity to affect the course and outcome of the proceeding, it is difficult to conceive what it is he is supposed to do.
>
> The format for an effective performance by counsel is a hearing, thus it seems plain that *Mempa's* express requirement of counsel carries with it an implied right to a fair revocation hearing. If this interpretation is correct, then *Mempa* overturned an earlier decision, *Escoe v. Zerbst*, and without the courtesy of even a footnote reference. *Cohen, The Legal Challenge to Corrections: Implications for Manpower and Training, Joint Commission on Correctional Manpower and Training.* (1969)

Petitioners believe that a balancing of the appropriate interests as set forth above and an analysis of this Court's holding in *Mempa v. Rhay* require the conclusion that revocation of parole without notice and an opportunity for a hearing constitutes a denial of due process as guaranteed to Petitioners under the due process clause of the Fourteenth Amendment. However, it is also appropriate to consider the principal arguments, in addition to the classification of parole as a mere "privilege," which have in the past been relied on as a basis for finding that due process does not require a hearing prior to revocation of parole.

IV. THE "CONTRACT THEORY" DOES NOT SUPPORT THE POSITION THAT PAROLE MAY BE REVOKED WITHOUT A HEARING

It has been urged that parole is in the nature of a contract between the parolee and the state and that the parolee, a party to such contract, cannot complain if his parole is summarily revoked without notice or an opportunity to be heard, since this was one of the conditions in the "contract." In fact, the Parole Agreement used by the Iowa Board of Parole (A. 100-01) appears to have been drafted with this theory in mind, containing in the first paragraph thereof a recital of consideration, to-wit:

> I, _____ No. _____ in consideration of being placed on parole by the Board of Parole of the State of Iowa, do hereby agree . . . . (A. 100)

However, as has been accurately stated by Judges Celebreeze and Lay, dissenting in *Rose v. Haskins* and *Morrissey v. Brewer*, respectively, parole is not a contract and any comparison with contract law is unrealistic and not persuasive. A parolee does not have any bargaining power in the negotiation of the term of his parole agreement, does not enter into the parole agreement on an equal status with the state, cannot object to terms he may think unreasonable and, since the parole agreement is presented to him on a take-it or leave-it basis, has no reasonable choice but to sign the agreement regardless of its terms. *Morrissey v. Brewer*, *supra* at 962 (A. 150-51) (dissenting opinion); *Hahn v. Burke*, *supra* at 104-05; *Rose v. Haskins*, *supra* at 99-100 (dissenting opinion). Further emphasizing the fallacy of the contract theory argument, Judge Celebreeze stated in his dissent in *Rose v. Haskins* that:

> [I]f the theory only means that the State in fact attached such a condition to the parolee's freedom, the question remains whether the State can attach such a condition. For if the negative pregnant that is implicit in the contract theory is true (that if the parolee had not agreed to summary revocation he would have had the right to a hearing), then that

> theory has recognized that a right to a hearing is inherent in the revocation situation. Waiver of such a valuable right is not to be lightly determined, and when the "choice" of the parolee is to remain in prison or accept such a burdensome provision, the "choice" to accept parole can hardly be termed a voluntary waiver of the right to hearing. 388 F.2d at 100.

Petitioners agree that the contract theory is based on false logic and is not properly applicable in the context of parole revocation. While a parole revocation hearing which is required by due process of law may be voluntarily and knowingly waived by a parolee it is not reasonable to base a waiver of the right to a hearing upon any term of a parole agreement.

Finally, this Court has rejected the contract characterization of probation by describing it as a "favor not a contract tract." *Burns v. United States*, 287 U.S. 216 (1932).

V. THE "CONSTRUCTIVE CUSTODY THEORY" DOES NOT SUPPORT THE VIEW THAT PAROLE MAY BE REVOKED WITHOUT A HEARING

It has further been urged in support of decisions holding that there is no right to a hearing prior to parole revocation that a parolee is, while on parole, still in the constructive custody of the prison authorities, even though not in physical custody. The majority in *Rose v. Haskins* followed the reasoning of the Ohio Supreme Court and compared the status of a parolee to that of a prison "trusty" stating that "a 'trusty' certainly cannot complain that his constitutional rights have been violated if his privileges are withdrawn." *Rose v. Haskins, supra* at 95. Apparently the court wishes that we conclude that neither trustys nor parolees have constitutional rights and that, as in the case of a trusty, a parolee cannot complain that his constitutional rights are violated if his parole is revoked.

In the first instance the constructive custody theory as espoused in *Rose v. Haskins* is suspect by attempting to equate the termination of "trusty" privileges with the revocation of parole. It goes almost without saying that the type of liberty enjoyed by a parolee, even though limited and conditional, is vastly different than that of a prison "trusty." It follows that a balancing of the parolee's interest in continued conditional liberty would greatly outweigh a "trusty's" interest in his continued status as such. Consequently, a different conclusion may well result from a weighing of a parolee's interest in continued conditional liberty against the government's interest in summary parole revocation than would result from a weighing of the "trusty's" interests against the government's interest in summary termination of that status. In addition, recent opinions have stated that all prisoners, whether trustys or not, are entitled to certain minimum procedural safeguards. *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Clutchette v. Procunier*, 328 F. Supp. 767, 779-85 (N.D. Cal. 1971). In this respect the court in *Sostre v. McGinnis* stated:

> If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), and afforded a reasonable opportunity to explain his actions. 442 F.2d at 198.

Finally, with respect to the constructive custody argument it would seem, if a parolee is, in fact, in the constructive custody of prison authorities while on parole, that time served in such constructive custody should logically apply

to the service of the parolee's sentence. However, Section 247.12, Code of Iowa (1971), provides:

> *247.12. Parole time not counted.* The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole is revoked.

In fact, it affirmatively appears in the record with respect to Petitioner Morrissey in the District Court below that upon his return to prison after parole revocation his discharge date was changed from August 6, 1970, to January 20, 1971 (A. 41). Therefore, it appears that the State of Iowa, while apparently relying at least in part on the constructive custody theory to support its position herein, does not give a parolee credit for the time he serves in such "constructive custody."

VI. DUE PROCESS REQUIRES NOTICE OF A HEARING, AN OPPORTUNITY TO BE HEARD, AN OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE WITNESSES, AND AN OPPORTUNITY FOR THE PAROLEE TO PRESENT EVIDENCE ON HIS OWN BEHALF

Petitioners submit that the preceding argument has shown that the due process clause of the Fourteenth Amendment requires some type of evidentiary hearing prior to revocation of parole, and that the theories relied upon in the past to deny such a hearing are legally insufficient and not supported by logic or reason. It is at this point appropriate to consider more precisely the type of hearing which Petitioners feel would satisfy the requirements of due process in this context. In this respect, we must keep in mind that the function of a hearing is twofold. First, unless the violation of parole is established by the conviction of another separate crime while on parole, or is voluntarily admitted by the parolee, the initial function of a hearing is to establish the *fact* of parole violation. If this fact is not established, the matter should be considered terminated and the parolee permitted to remain on parole. If the fact of viola-

tion is established the board of parole may then proceed to a determination of the proper disposition of the case. Petitioners in this case are primarily concerned with the initial, or fact-finding portion of the hearing since the latter decision regarding disposition is more appropriately within the discretion and expertise of the board of parole. What Petitioners fear is that the board of parole may proceed with this latter phase of the revocation process without first having established the fact of violation. With respect to this initial part of the hearing, Petitioners believe that essential procedural process requires notice and an opportunity to be heard, including the opportunity to confront and cross-examine adverse witnesses and to present evidence on his own behalf.

This Court has recently stated in *Goldberg v. Kelly* that:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 1369, 34 S. Ct. 779 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed termination as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases. . . . In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. 397 U.S. at 267-69.

Even though the language quoted above relates to the context of termination of welfare payments, it would seem that the requirements of due process should apply equally

as well in the context of parole revocation in which the parolee faces a "grievous loss" at least as great as that faced by the welfare recipient in the termination of payments situation. Petitioners submit, therefore, that a hearing prior to revocation must include *at least*: (1) adequate notice, (2) an opportunity to appear, (3) an opportunity to confront and cross-examine adverse witnesses and (4) an opportunity for the parolee to present his own witnesses or other evidence.

While this Court in *Goldberg v. Kelly* further states that:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. *Powell v. Alabama*, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55 (1932). 397 U.S. at 270,

the question of right to counsel is not precisely before this Court in these cases. Petitioners believe, however, that counsel would be an important part of any revocation hearing, and that this Court's holding in *Mempa v. Rhay* requires the appointment of counsel in parole revocation cases.

CONCLUSION

Based upon all of the foregoing, Petitioners submit that the due process clause of the Fourteenth Amendment requires a hearing prior to revocation of parole. Therefore, Petitioners believe, since their paroles were revoked without a prior hearing, that said revocations were legally defective and should be held to be void. The said revocations should, therefore, be stricken from the records of these Petitioners.

Respectfully submitted,

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Date – February 23, 1972